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7 **UNITED STATES DISTRICT COURT**
8
9 **EASTERN DISTRICT OF CALIFORNIA**

10 ERIC TRAVIS,

11 Plaintiff,

12 v.

13 AMERIHOME MORTGAGE COMPANY
14 LLC,

15 Defendant.

Case No. 1:23-cv-01267-ADA-SAB

FINDINGS AND RECOMMENDATIONS
RECOMMENDING GRANTING IN PART
AND DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

(ECF Nos. 3, 4, 7, 8)

**OBJECTIONS DUE WITHIN FOURTEEN
DAYS**

16
17 **I.**

18 **INTRODUCTION**

19 Currently before the Court is Defendant Amerihome Mortgage Company, LLC's motion
20 to dismiss Plaintiff Eric Travis' complaint with prejudice pursuant to Federal Rule of Civil
21 Procedure 12(b)(6). Based on the moving, opposition, and reply papers, the information
22 presented by counsel at the hearing held on October 18, 2023, and the Court's record, the Court
23 recommends Defendant's motion to dismiss be granted in part and denied in part.

24
25 **II.**

26 **BACKGROUND**

27 On July 20, 2023, Eric Travis ("Plaintiff") filed this action in the Superior Court of the
28 State of California, County of Fresno, Case No. 23CECG02934 against Amerihome Mortgage
Company, LLC ("Defendant"). (ECF No. 1.) Defendant removed this action to this Court on

1 August 23, 2023 on the basis of federal question jurisdiction. (Id. at 2-3.)

2 In May 2017, Plaintiff alleges he obtained a mortgage loan on his real property located at
3 1627 Jordan Avenue, Clovis, California 93411 (“Property”) for \$332,000.00 by deed of trust
4 from Country Club Mortgage, Inc. (Compl. ¶¶ 1, 9, Exhibit A.) Plaintiff alleges an assignment
5 of deed of trust was recorded in the Fresno County Recorder’s Office on October 20, 2021,
6 which assigned the deed of trust from Country Club Mortgage, Inc. to Defendant. (Compl. ¶ 10,
7 Exhibit B.) On February 24, 2023, Defendant recorded a notice of default and election to sell
8 under a deed of trust (“notice of default”). (Compl. ¶ 11, Exhibit C.) The notice of default
9 included a declaration from Defendant dated December 2, 2022, and signed on December 8,
10 2022, which detailed Defendant’s purported unsuccessful attempts to contact Plaintiff by mail
11 and telephone. (Id.) Plaintiff alleges the foreclosure trustee recorded a notice of trustee’s sale
12 (“notice of sale”) on May 22, 2023. (Compl. ¶ 12, Exhibit D.) Plaintiff contends the Property
13 was unlawfully sold on June 21, 2023. (Compl. ¶ 12.)

14 On August 30, 2023, Defendant filed a motion to dismiss this action with prejudice.
15 (Def.’s Mot. Dismiss (“Mot.”), ECF No. 3.) On September 13, 2023, Plaintiff filed an
16 opposition to Defendant’s motion to dismiss. (Pl.’s Opp’n Mot. (“Opp’n”), ECF No. 7.) On
17 September 25, 2023, Defendant filed a reply to Plaintiff’s opposition. (Def.’s Reply (“Reply”),
18 ECF No. 8.) The Court held a hearing on the matter on October 18, 2023. (ECF No. 9.)
19 Anthony Cara appeared via video on behalf of Plaintiff and Eric Houser appeared via video on
20 behalf of Defendant. (Id.) The Court took the matter under submission.

21 **III.**

22 **LEGAL STANDARD**

23 Under Federal Rule of Civil Procedure (“Rule”) 12(b)(6), a party may file a motion to
24 dismiss on the grounds that a complaint “fail[s] to state a claim upon which relief can be
25 granted.” A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the
26 complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). In deciding a motion to
27 dismiss, “[a]ll allegations of material fact are taken as true and construed in the light most
28 favorable to the nonmoving party.” Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th

1 Cir. 1996). The pleading standard under Rule 8 does not require “detailed factual allegations,”
 2 but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”
 3 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S.
 4 544, 555 (2007)). In assessing the sufficiency of a complaint, all well-pleaded factual allegations
 5 must be accepted as true. Iqbal, 556 U.S. at 678-79. However, “[t]hreadbare recitals of the
 6 elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id. at
 7 678. To avoid a dismissal under Rule 12(b)(6), a complaint must plead “enough facts to state a
 8 claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570.

9 In deciding whether a complaint states a claim, the Ninth Circuit has found that two
 10 principles apply. First, to be entitled to the presumption of truth, the allegations in the complaint
 11 “may not simply recite the elements of a cause of action, but must contain sufficient allegations
 12 of underlying facts to give fair notice and to enable the opposing party to defend itself
 13 effectively.” Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). Second, so that it is not unfair
 14 to require the defendant to be subjected to the expenses associated with discovery and continued
 15 litigation, the factual allegations of the complaint, which are taken as true, must plausibly
 16 suggest an entitlement to relief. Id. “Dismissal is proper only where there is no cognizable legal
 17 theory or an absence of sufficient facts alleged to support a cognizable legal theory.” Navarro,
 18 250 F.3d at 732 (citing Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988)).

19 IV.

20 DISCUSSION

21 In his complaint, Plaintiff alleges seven causes of action: violations of the California
 22 Homeowner Bill of Rights (“HBOR”), California Civil Code §§ 2923.5, 2924(a)(1), and 2924.9
 23 (the first through third causes of action, respectively); negligence; wrongful foreclosure;
 24 violation of California’s Unfair Competition Law (“UCL”) under California Business and
 25 Professions Code § 17200, et seq.; and cancellation of instruments. Notably, Plaintiff’s sole
 26 federal claim is not alleged as an independent cause of action; rather, Plaintiff alleges as a
 27 “general and factual allegation[]” that Defendant violated 15 U.S.C. § 1641(g), a provision of the
 28 Truth in Lending Act (“TILA”). Plaintiff’s TILA claim serves both as an alleged underlying

1 statutory duty for his fourth cause of action for negligence and predicate claim for his sixth cause
2 of action for violation of UCL.

3 Defendant seeks to dismiss Plaintiff's general allegation of violation of 15 U.S.C. §
4 1641(g) and each cause of action in Plaintiff's complaint. Defendant first argues Plaintiff
5 received timely notice that the deed of trust was assigned to Defendant, in compliance with 15
6 U.S.C. § 1641(g). Further, Defendant argues its December 2022 declaration attached to the
7 notice of default confirms Defendant complied with HBOR notice requirements. Defendant
8 alternatively argues that even if the declaration does not demonstrate compliance, Plaintiff is not
9 entitled to any relief under the first cause of action because the Property has already been sold.
10 Defendant avers Plaintiff's negligence claim fails as a matter of law because recent California
11 Supreme Court precedent has found that lenders and loan servicers do not owe borrowers a duty
12 to process, review, and respond to a borrower's loan modification application. Finally,
13 Defendant contends that Plaintiff's wrongful foreclosure, UCL, and cancellation of instruments
14 causes of action fail because each is derivative of Plaintiff's failed TILA, HBOR, and negligence
15 claims. Defendant also avers that Plaintiff lacks standing to assert a claim under the UCL.

16 **A. Defendant's Request for Judicial Notice**

17 Defendant requests this Court take judicial notice of four documents: (1) a deed of trust
18 recorded on May 9, 2017 in the Fresno County Recorder's Office; (2) an assignment of deed of
19 trust recorded on October 20, 2021 in the Fresno County Recorder's Office; (3) a notice of
20 default and election to sell recorded on February 24, 2023 in the Fresno County Recorder's
21 Office; and (4) a notice of trustee's sale recorded on June 21, 2023, in the Fresno County
22 Recorder's Office. (Req. Jud. Not., ECF No. 4.) As confirmed with Defendant's counsel at the
23 hearing held in this matter, the same four documents are also attached and incorporated in
24 Plaintiff's complaint in identical sequential order. (See ECF No. 1, Exhibits A-D).

25 "[C]ourts do not take judicial notice of documents, they take judicial notice of facts. The
26 existence of a document could be such a fact, but only if the other requirements of Rule 201 are
27 met." Cruz v. Specialized Loan Servicing, LLC, No. SACV2201610CJCJDEX, 2022 WL
28 18228277, at *2 (C.D. Cal. Oct. 14, 2022) (internal citation and quotations omitted). As a

1 general matter, judicial notice may be taken of recorded instruments because they are public
 2 records whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201; see Perez v. Am.
 3 Home Mortg. Servicing, Inc., No. 12-cv-009323-WHA, 2012 WL 1413300, at *2 (N.D. Cal.
 4 Apr. 23, 2012) (taking judicial notice of deed of trust, notice of default, assignment of deed of
 5 trust, and substitution of trustee recorded with Alameda County Recorder's Office). However,
 6 while matters of public record are proper subjects for judicial notice, a court may not take
 7 judicial notice of a fact within a public record that is "subject to reasonable dispute." Lee v. City
 8 of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citing Fed. R. Evid. 201(b)).

9 Here, the Court has authority under Rule 201 to take judicial notice that the (1) deed of
 10 trust; (2) assignment of deed of trust; (3) notice of default; and (4) notice of sale were recorded
 11 with the Fresno County Recorder's Office on the dates indicated by the receipt stamp; however,
 12 the Court's judicial notice "extends only to the existence of these documents and not to their
 13 substance, which may contain disputed or irrelevant facts." Givens v. Newsom, 629 F. Supp. 3d
 14 1020, 1024 (E.D. Cal. 2022). Accordingly, the Court grants judicial notice limited to the facts
 15 that the four documents exist and were publicly filed in the Fresno County Recorder's Office on
 16 the respective dates reflected on each document.¹

17 **B. First Cause of Action for Violation of California Civil Code section 2923.5²**

18 Plaintiff's first cause of action alleges Defendant violated California Civil Code section
 19 2923.5(a)(2), which requires a "mortgagee, beneficiary or authorized agent" to "contact the
 20 borrower in person or by telephone in order to assess the borrower's financial situation and
 21 explore options for the borrower to avoid foreclosure" prior to recording a notice of default.

22

23 ¹ Because Plaintiff filed the (1) deed of trust; (2) assignment of deed of trust; (3) notice of sale
 24 as exhibits to his complaint, Plaintiff has incorporated by reference certain facts contained in the documents, rendering
 25 Defendant's request unnecessary. See Lee, 250 F.3d at 688 (noting "a court may consider material which is properly
 26 submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for
 27 summary judgment"). Any analysis by the Court regarding such facts shall be attributed to Plaintiff's incorporation of
 28 the facts by reference to the recorded documents in his complaint, rather than Defendant's request for judicial notice.

² Plaintiff's first cause of action asserts a violation of section 2923.5, yet Defendant's motion repeatedly cites section
 2923.55. Although the two provisions are "substantively similar," section 2923.55 "generally applies only to larger
 29 mortgage servicers," while section 2923.5 "applies to smaller servicers." Warren v. PNC Bank Nat'l Ass'n, No. 22-
 297875-WHO, 2023 WL 3182952, at *4 (N.D. Cal. Apr. 30, 2023) (citing Billesbach v. Specialized Loan
 29 Servicing, LLC, 63 Cal. App. 5th 830, 844 n.7 (2021)). Because Plaintiff relies on section 2923.5 in both his
 29 complaint and opposition, the Court herein addresses the claim under section 2923.5.

1 Defendant argues Plaintiff's first cause of action should be dismissed for two reasons:
2 (1) Plaintiff fails to state a cognizable claim because Defendant's December 2022 declaration
3 confirms Defendant fully complied with section 2923.5 and (2) Plaintiff's claim fails as a matter
4 of law because the Property has already been sold and the only remedy for a violation of section
5 2923.5 is postponement of an impending foreclosure. (Mot. 10-11.)³

6 1. Defendant's December 2022 Declaration Does Not Prove Plaintiff Fails State a
7 Cognizable Claim Under Section 2923.5(a)(2)

8 Plaintiff alleges that despite residing at the Property when the Notice of Default was
9 recorded on February 24, 2023, he "received no mail or messages" from Defendant to assess
10 Plaintiff's financial situation and explore options to avoid foreclosure, in violation of section
11 2923.5(a)(2). (Compl. ¶ 19.) In response, Defendant points to its December 2022 declaration—
12 which was both recorded with the notice of default on February 24, 2023, and attached as an
13 exhibit to Plaintiff's complaint—that details Defendant's diligent attempts to contact Plaintiff in
14 conformance with section 2923.5. (Mot. 9.) Defendant argues Plaintiff fails to state a claim
15 under section 2923.5(a)(2) because his allegations that he did not receive proper notice is
16 contradicted by the recorded December 2022 declaration.

17 Defendant cites both Kamp v. Aurora Loan Services, No. SACV09008440CJC(RNBx),
18 2009 WL 3177636 (C.D. Cal. October 1, 2009) and Juarez v. Wells Fargo Bank, N.A., No.
19 CV093104AHM(AGR), 2009 WL 3806325 (C.D. Cal. Nov. 11, 2009) to support its proposition
20 that a declaration recorded with the notice of default is sufficient to satisfy a defendant's
21 obligations under section 2923.5. (Mot. 10.) However, the Court notes that both the Kamp and
22 Juarez plaintiffs were specifically challenging California Civil Code section 2923.5(c), which
23 requires that a recorded notice of default include a declaration that the servicer has contacted or
24 attempted to contact the borrower with due diligence to attempt to avoid foreclosure. Here,
25 Plaintiff has not alleged that Defendant failed record the December 2022 declaration; rather,
26 Plaintiff is indirectly challenging the content of the declaration.

27
28 ³ All references to pagination of specific documents pertain to those as indicated on the upper right corners via the
CM/ECF electronic court docketing system.

1 The Court similarly finds Defendant's reliance on Cabanilla v. Wachovia Mortg., No.
2 SACV1200228CJC(JPRx), 2012 WL 13020028 (C.D. Cal. March 20, 2012) to be unavailing.
3 Unlike the instant case, the Cabanilla plaintiffs alleged that the defendant mortgage servicer
4 contacted the plaintiffs via telephone prior to filing the notice of default. (Id. at 3.) However,
5 the crux of the Cabanilla plaintiffs' section 2923.5 claim was that the contact from the mortgage
6 servicer "requires a discussion of possible means of avoiding foreclosure, rather than merely a
7 cursory phone call assessing the borrower's financial situation." (Id.) Thus, the plaintiffs were
8 challenging the *extent* to which a servicer must advise borrowers during the initial contact.
9 Conversely, Plaintiff in the instant action challenges the *existence* of the initial contact.
10 Specifically, Plaintiff alleges in his complaint he "received no mail or messages" from Defendant
11 prior to Defendant's recording of the notice of default.

12 The Court finds Defendant's argument in favor of dismissal of Plaintiff's first cause of
13 action to be unavailing at the pleadings stage because it is rooted entirely on a factual challenge.
14 See Lee, 250 F.3d at 688 ("Factual challenges to a plaintiff's complaint have no bearing on the
15 legal sufficiency of the allegations under Rule 12(b)(6)"). Defendant proffers by way of its
16 recorded December 2022 declaration that it attempted to contact Plaintiff numerous times in
17 compliance with section 2935.5(a)(2); however, Plaintiff alleges Defendant did not contact
18 Plaintiff at all, in violation of section 2935.5(a)(2). (Mot. 10; Compl. 19.) The Court cannot
19 resolve such a factual disagreement at the pleadings stage. See, e.g., Kennedy v. Bank of Am.,
20 N.A., No. 12-CV-952 YGR, 2012 WL 1458196, at *5 (N.D. Cal. Apr. 26, 2012) (noting the
21 truthfulness of a declaration stating a servicer tried with due diligence to contact the borrower in
22 accordance with section 2923.5 cannot be established on the pleadings); Barriónuevo v. Chase
23 Bank, N.A., 885 F. Supp. 2d 964, 977 (N.D. Cal. 2012) ("When a plaintiff's allegations dispute
24 the validity of defendant's declaration of compliance in a Notice of Default ... the plaintiff has
25 plead[ed] enough facts to state a claim to relief that is plausible on its face"). Here, Plaintiff has
26 plausibly alleged that Defendant did not contact him prior to recording the notice of default to
27 assess Plaintiff's financial situation and explore options to avoid foreclosure in violation of
28 section 2923.5(a)(2). Accordingly, the Court finds Plaintiff has properly pled a violation of

1 section 2923.5(a)(2).

2 2. Plaintiff Is Not Entitled to Any Relief Under Section 2923.5

3 Defendant alternatively argues that even if Plaintiff states a cognizable claim under
4 section 2923.5, Plaintiff has no available relief because the only remedy for a violation of section
5 2923.5 is postponement of an impending foreclosure. (Mot. 11.) Because it is undisputed the
6 Property was already sold in a nonjudicial trustee's sale on June 21, 2023, Defendant argues
7 Plaintiff has failed to state a claim upon which any relief can be granted. (*Id.*; Compl. ¶ 12.) The
8 Court agrees. See Mabry v. Superior Court, 185 Cal. App. 4th 408, 214 (2010) (clarifying that
9 the only remedy available under Section 2923.5 is "a postponement of an impending foreclosure
10 to permit the lender to comply with [section 2923.5]"); Herrejon v. Ocwen Loan Servicing LLC,
11 990 F. Supp. 2d 1186, 1210 (E.D. Cal. Nov. 1, 2013) (noting "if the foreclosure sale has
12 occurred, section 2923.5 provides plaintiffs no remedy"). At the hearing held in this matter on
13 October 18, 2023, Plaintiff's counsel conceded no remedy is available to Plaintiff under section
14 2923.5. Because it is undisputed Plaintiff has no available remedy for Defendant's alleged
15 violation of section 2923.5, the Court recommends granting Defendant's motion to dismiss
16 Plaintiff's first cause of action without leave to amend.

17 C. **Second Cause of Action for Violation of California Civil Code § 2924(a)(1)**

18 In his opposition to Defendant's motion to dismiss, Plaintiff states that he "will cease to
19 pursue causes of action for Violation of 2924(a)(1)." (Opp'n 5.) Accordingly, the Court
20 recommends granting Defendant's motion to dismiss Plaintiff's second cause of action without
21 leave to amend.

22 D. **Third Cause of Action for Violation of California Civil Code § 2924.9**

23 Plaintiff's third cause of action alleges Defendant violated California Civil Code section
24 2924.9, which requires that a mortgage servicer send the borrower a written communication
25 containing specific information regarding foreclosure prevention alternatives within five
26 business days after recording a notice of default. The remedy for section 2924.9 is governed by
27 section 2924.12, which states:

28 After a trustee's deed upon sale has been recorded, a mortgage

1 servicer, mortgagee, trustee, beneficiary, or authorized agent shall
2 be liable to a borrower for actual economic damages ... *resulting*
3 *from a material violation* of section 2923.55, 2923.6, 2923.7,
4 2924.9, 2924.10, 2924.11, or 2924.17 by that mortgage servicer,
5 mortgagee, trustee, beneficiary, or authorized agent where the
6 violation was not corrected and remedied prior to the recordation
7 of the trustee's deed upon sale.

5 Cal. Civ. Code 2924.12(b) (emphasis added).

6 1. Plaintiff Has Adequately Alleged He Received No Communications from
7 Defendant After the Notice of Default Was Recorded

8 Defendant avers that section 2924.9 applies to discussions about foreclosure alternatives
9 after the notice of default is recorded, not before the nonjudicial foreclosure process is
10 commenced. (*Id.*) Defendant argues “Plaintiff alleges only that he ‘did not receive any phone
11 calls or phone messages and did not receive any pieces of mail that referred to discussions about
12 alternatives [to foreclosure] *before* it was commenced.’” (Mot. 13 (citing Compl. ¶ 33).)
13 Plaintiff maintains in his opposition that he was not contacted by Defendant within five days
14 after the recording of the notice of default. (Opp’n 11.)

15 The Court disagrees with Defendant’s interpretation of Plaintiff’s complaint. While
16 Plaintiff alleges that he did not receive any communication prior to the notice of default being
17 recorded, Plaintiff also alleges he did not receive the requisite communication regarding
18 foreclosure prevention alternatives after the notice of default was recorded. Specifically,
19 Plaintiff expressly alleges Defendant failed to notify him of any foreclosure prevention
20 alternatives within five business days after the Notice of Default was recorded. (Compl. ¶ 32.)
21 Plaintiff further alleges that he was “staying in his home when the Notice of Default was issued
22 and received no mail or messages.” (*Id.* at ¶ 33.) Accordingly, the Court finds Plaintiff has
23 adequately pled he received no communication from Defendant following the recording of the
24 notice of default in violation of section 2924.9.

25 2. Plaintiff Has Adequately Alleged a Material Violation of Section 2924.9

26 California Civil Code section 2924.12(b) only provides a remedy for a “material violation” of
27 section 2924.9. “A material violation occurs where the violation: (1) affects the borrower’s loan
28 obligations, (2) disrupts the borrower’s loan modification process, or (3) causes the borrower to

1 suffer harm that he would not have otherwise suffered related to his right to be considered for
 2 loss mitigation options.” Mountjoy v. Seterus, Inc., No. 2:15-CV-02204-DJC-DB, 2023 WL
 3 4086763, at *11 (E.D. Cal. June 20, 2023) (citing Morris v. JPMorgan Chase Bank, N.A., 78
 4 Cal. App. 5th 279, 304–05 n.14 (2022)); see also Cornejo v. Ocwen Loan Servicing, LLC, 151 F.
 5 Supp. 3d 1102, 1113 (E.D. Cal. 2015) (noting that in the context of HBOR, a material violation
 6 is one where “the alleged violation affected a plaintiff’s loan obligations or the modification
 7 process”). “While some [district courts within the Ninth Circuit] have held that materiality is a
 8 question that cannot be resolved at the pleading stage, Plaintiff still must plead something to
 9 satisfy 2924.12’s materiality requirement.” Galvez v. Wells Fargo Bank, N.A., No. 17-CV-
 10 06003-JSC, 2018 WL 4849676, at *5 (N.D. Cal. Oct. 4, 2018) (citing Cardenas v. Caliber Home
 11 Loans, Inc., 281 F. Supp. 3d 862, 869 (N.D. Cal. 2017) (noting courts take “divergent
 12 approaches” with some concluding that materiality cannot be resolved at the pleading stage and
 13 others finding that a violation is only material if it is plausible the violation caused Plaintiff to
 14 suffer some harm).

15 Defendant argues that even if it violated section 2924.9, Plaintiff’s claim should be
 16 dismissed with prejudice because Plaintiff fails to allege specific facts showing Defendant’s
 17 alleged violation amounted to a material violation that impacted Plaintiff’s ability to obtain a
 18 loan modification pursuant to section 2924.12. (Mot. 13.) In opposition, Plaintiff fails to
 19 respond to Defendant’s argument regarding materiality specifically under his section 2924.9
 20 argument. However, Plaintiff argues under his first cause of action for another HBOR violation
 21 that Defendant failed to give Plaintiff any loss mitigation options after recording the notice of
 22 default. (Opp’n 10.) Plaintiff argues Defendant’s violation of section 2924.9 amounts to a
 23 material violation because Plaintiff “lost the chance to receive a loan modification that he would
 24 otherwise have been eligible for” and he suffered harm because he “had to pay additional interest
 25 & late charges and fees associated with inspection on the property which servicers normally do
 26 every month and is standard procedure when foreclosure activity is initiated.” (Opp’n 11.)

27 Turning to Plaintiff’s complaint, Plaintiff alleges Defendant failed to notify him via “mail
 28 or message[]” of any foreclosure prevention alternatives within five business days after the

1 notice of default was recorded, as required by section 2924.9. (Compl. ¶¶ 31-32.) Plaintiff
2 further alleges that had he received the contact and communication required under section
3 2924.9, he “would have taken action to avoid the foreclosure of the Subject Property with other
4 lending sources.” (*Id.* at ¶ 33.) Instead, Plaintiff alleges Defendant foreclosed on the property
5 and recorded the notice of sale in May 2023. (*Id.* at ¶ 12.)

6 Two District Courts in California have each recently found identical allegations by
7 plaintiffs to be plausible to allege a material violation of section 2924.9. First, in Warren v. PNC
8 Bank National Association, a Northern District of California Court found a defendant’s failure to
9 communicate about foreclosure prevention alternatives disrupted the plaintiff’s loan modification
10 process or otherwise harmed him by “closing the door to anything but foreclosure.” 2023 WL
11 3182952, at *5. The complaint in Warren identically alleged that the plaintiff “did not receive
12 any phone calls or phone messages and did not receive any piece of mail that referred to
13 foreclosure alternatives,” but if the plaintiff had received “such contact and communication he
14 would have taken action to avoid the foreclosure of the subject property with other lending
15 sources.” *Id.* The court noted that filing a notice of default is the first step in the foreclosure
16 process and therefore found it plausible that the defendant-servicer’s failure to contact plaintiff
17 about the first step “disrupted [plaintiff’s] loan modification process (by closing that process off
18 before it could even begin) or caused [plaintiff] harm (by foreclosing upon his home without
19 proper notice).” *Id.* at *4. The court therefore found the plaintiff sufficiently alleged a material
20 violation of section 2924.9.

21 Similarly, in Scott v. Cenlar FSB, a Central District of California Court found the
22 defendant-servicer’s alleged violation of section 2924.9 affected the loan modification process
23 and was material where Plaintiff alleged that “if he had received the required communication, he
24 would have taken action to avoid foreclosure with other lending sources.” No. 2:23-cv-05473-
25 SVW-MRW, 2023 WL 6881906, at *2 (C.D. Cal. September 28, 2023). The court relied on the
26 Eastern District’s decision, Hsin-Shawn Sheng v. Select Portfolio Servicing, Inc., which found a
27 defendant’s alleged violation of section 2924.10(a)—which requires mortgage servicers to
28 provide written acknowledgment of documents received from borrowers within five days of

1 receipt—had “affected” the loan modification process by making it difficult for the borrower to
2 determine whether her application was complete. No. 2:15-cv-0255-JAM-KJN, 2015 WL
3 4508759, at *3 (E.D. Cal. July 24, 2015). The court in Scott reasoned that the communication
4 required by section 2924.9, which specifically requires that the servicer communicate (1) that the
5 borrower may be evaluated for foreclosure prevention alternatives, (2) whether an application
6 must be submitted to be considered for such alternatives, and (3) how the borrower can obtain an
7 application, was “integral to the loan modification process” because, similar to the violation
8 found in Hsin-Shawn Sheng, it informed the borrower about the foreclosure process and the
9 required documents. Id. The court in Scott therefore determined that plaintiff had sufficiently
10 alleged a material violation because had the plaintiff “been better informed, it is plausible that he
11 could have modified the loan with other lending sources.” Id.

12 The Court finds the reasoning in Warren and Scott persuasive in the instant action
13 wherein Plaintiff pleads an identical allegation that he “would have taken action to avoid the
14 foreclosure of the Subject Property with other lending sources.” (Compl. ¶ 33.) Plaintiff’s
15 allegations plausibly demonstrate that Plaintiff’s loan modification process was affected by
16 Defendant’s alleged violation of section 2924.9 because Defendant’s lack of communication
17 precluded Plaintiff from taking action—for example, modifying the loan—through other lending
18 sources. (See Opp’n at 11 (“Plaintiff lost the chance to receive a loan modification that he would
19 otherwise have been eligible for”)).

20 Defendant also briefly argues Plaintiff’s failure to specify what action he would have
21 taken with other lending sources, coupled with the “substantial length of time” between the
22 notice of default being recorded in February 2023 and the June 2023 sale of the Property, equates
23 to a “fail[ure] to *plead* any materiality.” (Mot. 13 (emphasis added).) The Court disagrees.
24 First, the pleading standard under Rule 8 does not require such detailed factual allegations.
25 Iqbal, 556 U.S. at 678. Here, Plaintiff alleges he “would have taken action to avoid the
26 foreclosure of the Subject Property with other lending sources.” (Compl. ¶ 33.) As discussed,
27 this is sufficient to state a plausible claim for a material violation of section 2924.9 without the
28 need for a laundry list of other actions Plaintiff would have taken had he received the required

1 communication from Defendant regarding foreclosure alternatives. Further, the Court finds
 2 Defendant's argument regarding the length of time between the notice of default and the actual
 3 sale goes to proving materiality rather than the instant relevant inquiry of whether Plaintiff has
 4 pled a material violation. See, e.g., Warren, 2023 WL 3182952, at *4 (noting plaintiff "must
 5 plead something to satisfy 2924.12's materiality requirement," but he "need not *prove* materiality
 6 at this point"); Scott, 2023 WL 6881906, at *2 (noting "materiality is an issue better reserved for
 7 summary judgment"); Garcia v. PNC Mortgage, No. C 14-3543 PJH, 2015 WL 534395, at *4
 8 (N.D. Cal. Feb. 9, 2015) (finding materiality raises issues of fact that cannot be determined on a
 9 Rule 12(b)(6) motion); Hestrin v. CitiMortgage, Inc., No. 2:14-CV-9836-SVW-AJW, 2015 WL
 10 847132, at *3 n.4 (C.D. Cal. Feb. 25, 2015) (noting "materiality is often a question of fact
 11 inappropriate for resolution on a Rule 12 motion"). The Court therefore finds Plaintiff's
 12 allegation that had he received the communication required under section 2924.9, he "would
 13 have taken action to avoid the foreclosure of the Subject Property with other lending sources"
 14 sufficiently satisfies 2924.12's materiality requirement at this motion to dismiss stage.

15 Construing the facts as alleged in the light most favorable to Plaintiff, the Court finds that
 16 Plaintiff has plausibly alleged a material violation of section 2924.9 by Defendant. The Court
 17 therefore recommends denying Defendant's motion to dismiss Plaintiff's third cause of action.

18 **E. Fourth Cause of Action for Negligence**

19 At the hearing held in this matter on October 18, 2023, Plaintiff's counsel informed the
 20 Court that Plaintiff does not oppose Defendant's argument that Plaintiff's fourth cause of action
 21 should be dismissed. Accordingly, the Court recommends granting Defendant's motion to
 22 dismiss Plaintiff's fourth cause of action without leave to amend.

23 **F. Fifth Cause of Action for Wrongful Foreclosure**

24 Wrongful foreclosure "is an equitable action to set aside a foreclosure sale, or an action
 25 for damages resulting from the sale, on the basis that that the foreclosure was
 26 improper." Sciarratta v. U.S. Bank Nat'l Ass'n, 247 Cal. App. 4th 552, 561 (2016). The
 27 elements of the tort of wrongful foreclosure are as follows:

28 (1) the trustee or mortgagee caused an illegal, fraudulent, or

1 willfully oppressive sale of real property pursuant to a power of
 2 sale in a mortgage or deed of trust; (2) the party attacking the
 3 sale...was prejudiced or harmed; and (3) in cases where the trustor
 4 or mortgagor challenges the sale, the trustor or mortgagor tendered
 the amount of the secured indebtedness or was excused from
 tendering.

5 Id. at 561-62. Defendant challenges Plaintiff's wrongful foreclosure claim on each of the three
 6 elements.

7 1. Illegal, Fraudulent, or Willfully Oppressive Trustee's Sale

8 Defendant first argues that Plaintiff failed to plead facts sufficient to show an illegal,
 9 fraudulent, or willfully oppressive sale. Defendant avers Plaintiff's wrongful foreclosure claim
 10 necessarily fails because it is based on allegations that Defendant violated California Civil Code
 11 sections 2923.5, 2924(a)(1), 2934a(a)(1), 2924a(e), and 2924.9, which Defendant contends are
 12 failed claims. (Mot. 15.)

13 As previously discussed, the Court recommends Plaintiff's claims under section 2923.5
 14 (first cause of action) and "2924(a)(1), 2934a(a)(1), and 2924a(e)" (second cause of action) be
 15 dismissed with prejudice. However, because the Court recommends finding Plaintiff has
 16 sufficiently alleged a claim under section 2924.9, Defendant's argument is unavailing. See
 17 Santana v. BSI Fin. Servs., Inc., 495 F. Supp. 3d 926 at 948 (S.D. Cal. 2020) (finding a properly
 18 alleged claim for wrongful foreclosure based on alleged violations of HBOR).

19 However, the Court notes that in his sparse opposition to Defendant's motion to dismiss
 20 his wrongful foreclosure claim, Plaintiff argues that "Defendant willingly and maliciously
 21 recorded the notice of default so defendant could claim Plaintiff was in default and thereafter file
 22 a fraudulent notice of sale." (Opp'n 17.) Plaintiff further argues "Defendant knew the house had
 23 equity and knew foreclosing on the property would quickly pay off the entire loan." (Id.) Given
 24 this opposition, the Court notes that to the extent Plaintiff is pleading a violation of the
 25 "fraudulent sale" prong of wrongful foreclosure in his complaint, it falls short. Rule 9(b)
 26 requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake.
 27 Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."
 28 Fed. R. Civ. P. 9(b). "Averments of fraud must be accompanied by the who, what, where, when,

1 and how of the misconduct charged.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th
 2 Cir. 2003) (internal quotations omitted). Plaintiff has not met the heightened pleading standards
 3 under Rule 9, as he fails to allege any facts in his complaint that support his argument in his
 4 opposition that Defendant has engaged in a fraudulent sale of the Property. Should Plaintiff elect
 5 to amend his complaint, more specificity is required to plausibly allege that Defendant caused a
 6 fraudulent sale of the Property under a wrongful foreclosure claim. Accordingly, the Court finds
 7 only that Plaintiff has sufficiently alleged that Defendant engaged in an unlawful sale of his
 8 Property based on its alleged violation of section 2924.9.

9 2. Prejudice or Harm to Plaintiff

10 Defendant next argues Plaintiff failed to plead facts demonstrating he was prejudiced or
 11 harmed by Defendant’s violation of section 2924.9. (Mot. 15.) Indeed, Plaintiff only generally
 12 alleges within his fifth cause of action in his complaint that he “suffered prejudice or harm as a
 13 result of the wrongful foreclosure,” which is conclusory and devoid of factual allegations.
 14 (Compl. ¶ 44.) However, Plaintiff also “realleges and incorporates all preceding paragraphs as
 15 though set forth fully” within his fifth cause of action. (Compl. ¶ 41.) See Mountjoy, 2018 WL
 16 339060, at *15 (liberally construing the complaint and holding the plaintiff sufficiently alleged
 17 harm caused by the wrongful foreclosure by incorporating by reference the allegations made in
 18 multiple places in the complaint). Plaintiff alleges in preceding causes of action that he suffered
 19 harm including immediate damage to his credit and emotional and mental suffering as a result of
 20 Defendant’s alleged wrongful conduct.⁴ (Compl. ¶¶ 28, 39); see Miles v. Deutsche Bank Nat’l
 21 Trust Co., 236 Cal. App. 4th 394, 409 (2015) (finding damages for wrongful foreclosure include
 22 damage to credit and emotional distress). Accordingly, the Court finds Plaintiff plausibly
 23 alleged he suffered harm as a result of Defendant’s alleged wrongful foreclosure.

24 3. Tender Rule

25 Defendant argues Plaintiff’s wrongful foreclosure claim fails under the third element

26 ⁴ The Court notes that the specified harm incorporated in Plaintiff’s fifth cause of action is only alleged in the
 27 second cause of action, which Plaintiff has stated he “will cease to pursue” (Opp’n 5), and fourth cause of action,
 28 which Plaintiff’s counsel conceded at the October 18, 2023 hearing that Plaintiff did not oppose. Should Plaintiff
 elect to amend his fifth cause of action, he must reallege how he was prejudiced or what harm he suffered as a result
 of Defendant’s alleged wrongful foreclosure.

1 because Plaintiff failed to allege that he tendered the full amount of the loan. (Mot. 15; Reply 9.)
2 “Where tendering is required and not excused, a plaintiff seeking to set aside an irregular sale
3 must allege tender of the full amount of the loan to maintain any cause of action that either is
4 based on the wrongful foreclosure allegations or seeks redress from that foreclosure.” Turner v.
5 Seterus, Inc., 27 Cal. App. 5th 516, 525 (2018). See also Medrano v. Caliber Homes Loans, Inc.,
6 No. EDCV 14-02038-VAP (DTBx), 2014 WL 7236925, at *8 (C.D. Cal. July 28, 2016) (noting
7 “before seeking to set aside a wrongful foreclosure, a plaintiff must either tender the entire
8 amount of the defaulted debt [] or raise one of four exceptions to the tender requirement”)
9 (citation omitted). Although Plaintiff never alleges in his complaint whether he tendered the full
10 amount of the loan, he specifically alleges that he is “excused from the tender requirement
11 because of [Defendant’s] violations of Civ. Code...2924.9.” (Compl. ¶ 45.) Because Plaintiff is
12 alleging excuse from tender, the Court finds Defendant’s argument that Plaintiff must allege that
13 he tendered the full amount of the loan unavailing.

14 Defendant also briefly argues that Plaintiff fails to allege any legitimate excuse for failure
15 to tender. (Mot. 15.) The Court agrees. A full tender may not be required if the plaintiff alleges
16 equitable exceptions to the tender rule, such as:

17 (1) where the borrower's action attacks the validity of the
18 underlying debt, tender is not required since it would constitute
19 affirmation of the debt; [citations] (2) when the person who seeks
20 to set aside the trustee's sale has a counter-claim or set-off against
21 the beneficiary, the tender and the counter-claim offset each other
22 and if the offset is greater than or equal to the amount due, tender
23 is not required; [citations] (3) a tender may not be required if it
24 would be ‘inequitable’ to impose such a condition on the party
25 challenging the sale; [citations] (4) tender is not required where the
trustor's attack is based not on principles of equity but on the basis
that the trustee's deed is void on its face (such as where the original
trustee had been substituted out before the sale occurred)[;]
[citations] [(5)] when the loan was made in violation of
substantive law, or in breach of the loan agreement or an
agreement to modify the loan[;] [citations] [and (6)] when the
borrower is not in default and there is no basis for the
foreclosure...

26 Turner, 27 Cal. App. 5th at 525–26 (internal quotations and citations omitted).

27 Here, Plaintiff only generally alleges Defendant’s HBOR violation excuses Plaintiff from
28 tendering the full amount of the loan. (Compl. ¶ 45.) Plaintiff provides no authority to support

1 his general allegation that a defendant's violation of section 2924.9 is itself a decisive equitable
 2 exception to the tender rule under a claim for wrongful foreclosure. Notably, "mere technical
 3 violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have
 4 been *entirely unauthorized* on the facts of the case." Miles, 236 Cal. App. 4th at 409 (emphasis
 5 added). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory
 6 statements" are insufficient to state a cognizable claim. Iqbal, 556 U.S. at 678. Because
 7 Plaintiff's complaint fails to plead facts demonstrating he is excused from tender, the Court
 8 recommends granting Defendant's motion to dismiss with leave to amend.

9 **G. Sixth Cause of Action for Violation of California Business and Professions
 10 Code § 17200**

11 The UCL prohibits "unfair competition," which is "any unlawful, unfair or fraudulent
 12 business act or practice...." Cal. Bus. & Prof. Code § 17200. The UCL "borrows violations
 13 from other laws by making them independently actionable as unfair competitive practices."
 14 Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143 (2003). "A business act or
 15 practice may violate the UCL if it is either 'unlawful,' 'unfair,' or 'fraudulent,'" as "[e]ach of
 16 these three adjectives captures 'a separate and distinct theory of liability.'" Rubio v. Cap. One
 17 Bank, 613 F.3d 1195, 1203 (9th Cir. 2010) (citing Kearns v. Ford Motor Co., 567 F.3d 1120,
 18 1127 (9th Cir. 2009)).

19 To have standing under the UCL, a private plaintiff must "(1) establish a loss or
 20 deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and
 21 (2) show that economic injury was the result of, i.e., *caused by*, the unfair business practice...that
 22 is the *gravamen of the claim*." Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322 (2011)
 23 (emphasis in original). Economic injuries from unfair competition include:

24 (1) surrender in a transaction more, or acquire in a transaction
 25 less, than [Plaintiff] otherwise would have; (2) have a present
 26 or future property interest diminished; (3) be deprived of
 27 money or property to which [Plaintiff] has a cognizable claim;
 or (4) be required to enter into a transaction, costing money or
 property, that would otherwise have been unnecessary.

28 Id. To show the economic injury was the result of an unlawful, unfair, or fraudulent business

1 practice, the plaintiff must show a “causal connection” between the injury and the alleged
 2 wrongful conduct. Id. at 326. However, “[a] plaintiff fails to satisfy the causation requirement if
 3 he or she would have suffered ‘the same harm whether or not a defendant complied with the
 4 law.’” In re Turner, 859 F.3d 1145, 1151 (9th Cir. 2017) (citation omitted).

5 Plaintiff alleges violations of the unfair, unlawful, and fraudulent prongs of the UCL as a
 6 result of Defendant’s alleged HBOR violations and violation of 15 U.S.C. § 1641(g). (Compl. ¶¶
 7 52-53.) The Court will address the predicate state law and federal law claims separately.

8 1. Plaintiff’s UCL Cause of Action Predicated on HBOR Violations

9 Plaintiff alleges “Defendant violated the ‘unfair,’ ‘unlawful,’ and ‘fraudulent’ prongs of
 10 the UCL resulting in injury and economic loss to Plaintiff when it purposefully violated [Cal.]
 11 Civ Code §§ 2923.5, 2924(a)(1), 2934a(a)(1), and 2924.9.” (Compl. ¶ 52.) Plaintiff further
 12 alleges Defendant’s “unlawful and unfair conduct has caused substantial harm to Plaintiff” which
 13 includes “actual, pecuniary injury of the loss of the equity in the value of the Subject Property,
 14 and the costs of seeking a remedy for [] Defendant’s wrongful actions.” (Id. ¶¶ 54, 57.)

15 Defendant argues Plaintiff’s UCL claim should be dismissed for two reasons. First,
 16 Defendant avers Plaintiff has not properly alleged any unlawful business practice undertaken by
 17 Defendant because Plaintiff has failed to properly state a claim for a violation of any law. (Mot.
 18 16.) The Court rejects this argument because the Court finds Plaintiff has sufficiently alleged
 19 that Defendant violated Cal. Civ. Code section 2924.9 by failing to send Plaintiff a written
 20 communication containing specific information regarding foreclosure alternatives within five
 21 business days after recording the notice of default.⁵ Accordingly, Plaintiff has alleged sufficient
 22 facts to support a cause of action against Defendant under the UCL’s unlawful theory of liability.

23 Second, Defendant argues that Plaintiff lacks standing to assert a UCL claim because he
 24 has not pled a loss of money or property that was caused by Defendant’s alleged wrongful
 25 conduct. (Mot. 17.) Defendant emphasizes that there is no dispute that Plaintiff was in default
 26

27 5 As previously discussed, the Court recommends dismissing Plaintiff’s section 2923.5 claim with prejudice and
 28 Plaintiff has withdrawn his 2924(a)(1) and 2934a(a)(1) claims. Thus, the Court only addresses Plaintiff’s derivative
 section 2925.9 claim under his UCL cause of action.

1 prior to any of Defendant's alleged misconduct, and thus Plaintiff cannot argue the loss of the
2 Property was caused by any unfair competition by Defendant. (Id.) Rather, Defendant argues
3 that "any economic injury is a byproduct of the failure to make mortgage payments." (Id.) In
4 opposition, Plaintiff contends he was "wrongfully deprived of alternatives to foreclosure and as
5 such, lost their [sic] home and have [sic] had to endure the expenses of the instant litigation as a
6 result of [Defendant's] failure to comply...[Defendant] continued to charge default, interest and
7 late fees to Plaintiff's account even though this is explicitly against statutory code." (Opp'n 19.)
8 In reply, Defendant argues Plaintiff's allegation that Defendant's alleged failure to contact him
9 regarding foreclosure alternatives "does not constitute a loss of money or property *caused by* the
10 alleged UCL violation because nothing in the mortgage or the law guarantees Plaintiff a
11 mortgage modification." (Reply 9.) Instead, Defendant maintains Plaintiff's own default caused
12 the initiation of property foreclosure. (Id.)

13 The Court finds Plaintiff has sufficiently alleged an economic injury to satisfy the first
14 prong of standing under the UCL. Plaintiff's allegation that Defendant's violation of section
15 2924.9 resulted in "the loss of the equity in the value of the Property" satisfies the economic
16 injury requirement as a diminution of a present or future property interest. Kwikset, 51 Cal. 4th
17 at 323. As to his second alleged economic injury, Plaintiff proffers no facts under his UCL cause
18 of action regarding "the costs of seeking a remedy for Defendant's wrongful actions" that
19 Plaintiff allegedly suffered. (Compl. ¶ 57.) In opposition, Plaintiff clarifies that Defendant
20 "continued to charge default, interest and late fees to Plaintiff's account." (Opp'n 19.) The Court
21 notes that Plaintiff "realleges and incorporates all preceding paragraphs as though set forth fully"
22 within his UCL cause of action. (Id. at ¶ 49.) As previously discussed, Plaintiff's fourth cause
23 of action—which Plaintiff conceded at the October 18, 2023 hearing—alleges Plaintiff suffered
24 damages including attorneys' fees, late penalties, damage to credit, higher arrears, and ultimately
25 foreclosure of the Property. (Id. at ¶ 39.) While not stated within his UCL claim, such damages
26 could also constitute economic injury to support standing under the UCL if properly realleged
27 upon amendment. See Avnieli v. Residential Credit Sols., Inc., No. 2:15-CV-02877-ODW, 2015
28 WL 5923532, at *4 (C.D. Cal. Oct. 9, 2015) (finding that "money spent preventing foreclosure

1 on [a] home, harm to their credit, and payment of interest, legal fees, and other costs...easily
2 satisfy the California Supreme Court's interpretation of [Cal. Bus. & Prof. Code] section
3 17204"); Gilliam v. Bank of America, N.A., SA CV 17-1296-DOC (JPRx), 2018 WL 6537160,
4 at *29 (June 22, 2018) (finding plaintiffs sufficiently alleged an injury because they "expended
5 money due to the defendant's acts of unfair competition"). The Court therefore finds Plaintiff
6 has pled a sufficient injury in fact.

7 The Court then turns to the issue of whether Plaintiff has established a "causal
8 connection" between Defendant's alleged failure to send Plaintiff a written communication
9 regarding foreclosure alternatives in violation of 2924.9 and Plaintiff's loss of equity in the value
10 of the Property. As Defendant points out, Plaintiff neither alleges in his complaint nor disputes
11 in his opposition that he defaulted on his loan. (Reply 9.) Some district courts conclude the
12 analysis on that point, finding that borrowers who default on loan payments before foreclosure
13 proceedings commence—and therefore before a defendant allegedly commits an HBOR
14 violation—fail to satisfy the causality prong because the borrower's own default caused the
15 otherwise lawful foreclosure proceedings to begin. See, e.g., Herrejon, 980 F. Supp. 2d at 1205
16 ("Foreclosure of the property fails to support a UCL claim in the absence of the plaintiffs'
17 performance to avoid default"); Cornejo, 151 F. Supp. 3d 1102 at 1118 ("Because [plaintiffs']
18 default occurred significantly prior to the alleged unlawful acts, the actions could not have
19 caused the [foreclosure]"); Petrey v. Wells Fargo Bank, N.A., 2:17-CV-00503-TLN-DB, 2018
20 WL 5099279, at *12 (E.D. Cal. Oct. 17, 2018) ("Plaintiff's default pre-dated [Defendants'
21 alleged unlawful conduct] and served to trigger foreclosure proceedings"); Ramirez v. U.S.
22 Bank, N.A., No. CV1701949RGKASX, 2017 WL 8223378, at *7 (C.D. Cal. May 26, 2017)
23 (finding no standing under the UCL because the plaintiff failed "to point to facts...that would
24 suggest that the imminent foreclosure of his property was not the result of his own failure to
25 make payments on his loan for over seven years, but rather was caused by [Defendant's]
26 technical violations of the HBOR..."); Flynn v. Wells Fargo Bank, N.A., 2:19-cv-00116 WBS
27 KJN, 2019 WL 2249600, at *15 (E.D. Cal. May 24, 2019) (finding the plaintiff failed to
28 plausibly allege that her injuries were proximately caused by the defendant's alleged violation of

1 HBOR; “[t]o the contrary, the allegations of the complaint tend to show that the proximate cause
 2 of plaintiff’s injuries was her inability to meet her obligations under the loan”); Gilliam, 2018
 3 WL 6537160, at *29 (“Plaintiffs must still show that Defendants’ illegal conduct, as opposed to
 4 Plaintiffs’ default, caused the foreclosure proceedings”); but see Cruz, 2022 WL 18228277, at *6
 5 (finding it “is enough to satisfy the causality component” when “[t]he gist of Plaintiffs’
 6 complaint” is that “they would have remained in possession of their property as a result of a loan
 7 modification or other foreclosure alternatives had Defendant’s complied with the HBOR”).

8 Here, Plaintiff blanketly alleges Defendant “violated the unlawful, unfair, and fraudulent
 9 prongs of the UCL resulting in injury and economic loss to Plaintiff when it purposely violated
 10 section 2924.9.” (Compl. ¶ 52.) Thus, Plaintiff’s unfair competition claim is derivative of his
 11 third cause of action and incorporates the wrongful conduct alleged therein. However, even
 12 when incorporating the facts alleged in his third cause of action, the Court is still strained to find
 13 a causal connection between Defendant’s alleged violation of section 2429.5 and Plaintiff’s loss
 14 of the Property. While Plaintiff does not allege that he defaulted on the loan, the complaint tends
 15 to show that the cause of the foreclosure was his inability to meet his obligations under the loan
 16 rather than Defendant’s subsequent purported HBOR violation. Thus, in the absence of
 17 allegations of Plaintiff’s performance to avoid default, Plaintiff’s complaint lacks clear factual
 18 allegations that the loss of his home or even his ambiguous “costs to remedy Defendant’s
 19 wrongful actions” were caused by Defendant’s alleged violation of section 2429.5. See
 20 Herrejon, 980 F. Supp. 2d at 1205. Accordingly, the Court recommends granting Defendant’s
 21 motion to dismiss Plaintiff’s UCL claim on the predicate violation of section 2429.5 but
 22 recommends granting leave to amend to allow Plaintiff to clarify the causal connection between
 23 Defendant’s alleged unlawful conduct and each alleged injury in fact.⁶

24

25 ⁶ Because the Court finds Plaintiff has not adequately alleged standing, the Court will not address Plaintiff’s
 26 allegations of UCL violations under the “unfair” and “fraudulent” prongs in length. However, the Court notes
 27 Defendant’s argument regarding Plaintiff’s shortcomings in alleging the fraudulent prong is well-taken.
 28 Specifically, Plaintiff’s only factual allegation supporting his fraudulent prong states that “the information provided
 to Plaintiff was certainly misleading and not consistent as to the status of the loan modification and what she [sic]
 was supposed to do to satisfy the lender’s demands.” (Compl. ¶ 54.) Not only is this allegation of fraud pled
 without the requisite specific particularity, but the Court agrees with Defendant that it is also inconsistent with
 Plaintiff’s repetitive allegations that Plaintiff was never contact by Defendant following the recorded notice of

1 2. Plaintiff's UCL Cause of Action Predicated on a Violation of 15 U.S.C. § 1641(g)

2 Plaintiff also alleges 15 U.S.C. § 1641(g) under TILA as a predicate violation of law to
 3 support a UCL claim. Section 1641(g) provides that when a mortgage loan is sold, transferred,
 4 or assigned to a third party, the new owner of the debt must notify the borrower of certain
 5 information in writing within thirty days of the transfer. 15 U.S.C. § 1641(g). A creditor that
 6 fails to comply with section 1641(g) is liable in an individual action for actual damages or
 7 specified statutory damages. 15 U.S.C. § 1640(a)(1)-(2). TILA imposes a one-year statute of
 8 limitations on private actions for damages. Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F.
 9 Supp. 2d 1048, 1059 (N.D. Cal. 2009) (citing 15 U.S.C. § 1640(e)).

10 Defendant argues it sent Plaintiff a notice of assignment on or about October 20, 2021,
 11 and therefore avers Plaintiff cannot plead a violation of section 1641(g) because Defendant
 12 "complied with the law." (Mot. 9.) Although Plaintiff failed to mention his section 1641(g)
 13 claim in his opposition—nonetheless respond to Defendant's argument to dismiss Plaintiff's
 14 general TILA claim—the Court finds Defendant's factual contention is improper at the motion to
 15 dismiss stage for the same reasons previously discussed in Plaintiff's first cause of action. See
 16 Lee, 250 F.3d at 688 ("Factual challenges to a plaintiff's complaint have no bearing on the legal
 17 sufficiency of the allegations under Rule 12(b)(6)").

18 However, the Court agrees with Defendant's general argument that Plaintiff has not pled
 19 sufficient facts to state a claim under section 1641(g). Plaintiff only generally alleges in his
 20 complaint that "Defendant failed to advise Plaintiff in writing within 30 days that his Deed of
 21 Trust was transferred or assigned to a third party, and that it is the new owner or assignee of the
 22 debt [sic] is illegal in violation of Title 15 U.S.C. § 1641(g)." (Compl. ¶ 16.) Parsing through
 23 his conclusory allegation, Plaintiff appears to base his general TILA claim on the allegation that
 24 the assignment of deed of trust recorded on October 20, 2021 triggered Defendant's disclosure
 25 obligations under section 1641(g). (Compl. ¶ 10.) However, section 1641(g) notice
 26 requirements only apply when a mortgage loan—not simply a deed of trust—is transferred or

27
 28 default. (See Compl. ¶ 19, 31, 33.) Kearns v. Ford Motor Co., 567 F.3d at 1125 (noting any claim under the
 "fraudulent" prong of the UCL is subject to Rule 9(b)'s heightened pleading standard).

1 assigned to a third party. “Based on its plain language, section 1641(g)’s disclosure obligation is
 2 triggered only when ownership of the ‘mortgage loan’ or ‘debt’ itself is transferred, not when the
 3 instrument securing the debt (that is, the mortgage) is transferred.” Cheatham v. Real Time
 4 Resolutions, Inc., No. 2:19-cv-08911-RGK-JPR, 2020 WL 1000606, at *3 (C.D. Cal. Jan. 7,
 5 2020) (finding plaintiff insufficiently pled a section 1641(g) claim when she merely pled
 6 Defendant failed to notify her that her deed of trust was assigned to a third party, not that a
 7 mortgage loan or underlying debt was transferred); see also Orosco v. Specialized Loan
 8 Servicing, LLC, No. 2:20-cv-00743-KJM-EFB, 2020 WL 4898054, at *4 (E.D. Cal. Aug. 20,
 9 2020) (finding plaintiffs insufficiently pled a section 1641(g) claim when they identically alleged
 10 the defendant failed to advise plaintiffs that the “Deed of Trust was transferred or assigned to a
 11 third party, and that it is the new owner of assignee of the debt is [sic] illegal in violation of Title
 12 15 U.S.C. § 1641(g)”). Without an allegation that Defendant, as the new owner or assignee of
 13 Plaintiff’s “mortgage loan,” failed to notify Plaintiff in writing of the transfer or assignment, the
 14 Court finds Plaintiff has not sufficiently pled a claim for violation of 15 U.S.C. § 1641(g).⁷

15 Given the UCL must “borrow” violations of other laws to be independently actionable as
 16 unfair competitive practices, the Court also finds Plaintiff’s insufficiently pled TILA violation
 17 cannot serve as a predicate violation under the UCL’s “unlawful” prong. Korea Supply Co., 29
 18 Cal. 4th at 1143. (See Compl. 53 (“Defendant’s business practices of failing to advise
 19 homeowners in writing within 30 days that his Deed of Trust was transferred or assigned to a
 20 third party, and that it is the new owner or assignee of the debt is illegal in violation of Title 15
 21 U.S.C. § 1641(g)).) Further, similar to his predicate state law violations, Plaintiff fails to allege
 22 any injury in fact caused by Defendant’s purported TILA violation in order to establish standing
 23 under the UCL.

24 ⁷ The Court notes Defendant removed the instant action to this court on the sole basis of federal question
 25 jurisdiction. (See ECF No. 1 at 3 (“Specifically, plaintiff alleges at paragraphs 16 and 53 of the Complaint that
 26 Defendant has violated Title 15 U.S.C. Section 1641(g) concerning alleged violation of federal law related to the
 27 assignment of the loan”.) Given the lack of diversity of citizenship between the parties, the Court’s subject matter
 28 jurisdiction is contingent on the survival of Plaintiff’s generally alleged TILA claim. Based on the Court’s finding
 that Plaintiff has failed to sufficiently allege a violation of 15 U.S.C. § 1641(g), the Court has no pending federal
 question before it. As discussed with the parties at the hearing held in this matter on October 18, 2023, the Court
 recommends remanding the action to state court should Plaintiff elect not to amend his complaint to sufficiently
 allege a violation of 15 U.S.C. § 1641(g).

1 Accordingly, the Court recommends granting Defendant's motion to dismiss Plaintiff's
 2 general allegations contained in paragraphs 16 and 53 for failure to state a claim for violation of
 3 15 U.S.C. § 1641(g) with leave to amend. Further, because Plaintiff has failed to properly state a
 4 claim for a violation of 15 U.S.C. § 1641(g), the Court also recommends granting Defendant's
 5 motion to dismiss Plaintiff's UCL cause of action wherein Plaintiff alleges 15 U.S.C. § 1641(g)
 6 as a predicate violation of law with leave to amend to the extent Plaintiff also amends his
 7 complaint to establish standing under the UCL.

8 **H. Seventh Cause of Action for Cancellation of Instruments**

9 Plaintiff's seventh cause of action seeks cancellation of the recorded notice of default and
 10 notice of sale. (Compl. ¶ 61.) Under California Civil Code section 3412, a court may order the
 11 cancellation of a written instrument if "there is a reasonable apprehension that if left outstanding
 12 it may cause serious injury to a person against whom it is void or voidable." Accordingly, to
 13 obtain cancellation of an instrument, a plaintiff "must show that he will be injured or prejudiced
 14 if the instrument is not cancelled, and that such instrument is void or voidable." Zendejas v.
 15 GMAC Wholesale Mortg. Corp., No. 1:10-CV-0184 OWW GSA, 2010 WL 2629899, at *7
 16 (E.D. Cal. June 29, 2010). "Cancellation of an instrument is essentially a request for rescission
 17 of the instrument." Deutsche Bank Nat'l Tr. Co. v. Pyle, 13 Cal. App. 5th 513, 523 (2017).

18 Plaintiff's complaint alleges that he has "reasonable belief" the notice of default and
 19 notice of sale "are voidable or void ab initio." (Compl. ¶ 61). However, as Defendant argues,
 20 Plaintiff fails to plead any facts to support the allegation that either instrument is "void or
 21 voidable," as required under section 3412. In his opposition, Plaintiff only reiterates the notice
 22 of default and notice of sale are "illicit recordings" and "disparaging instruments that were
 23 intended to affect Plaintiff and his home" without demonstrating how he has properly plead
 24 either instrument is "voidable or void ab initio." (Opp'n 22.) "Threadbare recitals of the
 25 elements of a cause of action, supported by mere conclusory statements" are insufficient to state
 26 a cognizable claim. Iqbal, 556 U.S. at 678. Because Plaintiff's complaint fails to plead facts
 27 demonstrating the notice of default and notice of trustee's sale are "void or voidable" and would
 28 cause "serious injury" if not canceled, the Court recommends granting Defendant's motion to

1 dismiss Plaintiff's seventh cause of action with leave to amend.

2 **I. The Court Recommends Granting Leave to Amend Plaintiff's Fifth, Sixth,
3 and Seventh Causes of Action.**

4 Under Rule 15(a), leave to amend "shall be freely given when justice so requires,"
5 because "the court must remain guided by the underlying purpose of Rule 15 ... to facilitate
6 decisions on the merits, rather than on the pleadings or technicalities." Lopez v. Smith, 203 F.3d
7 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted).
8 Nevertheless, a district court need not grant leave to amend where the amendment would unduly
9 prejudice the opposing party, cause undue delay, or be futile, or if the party seeking amendment
10 has acted in bad faith. Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)
11 (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). "The decision of whether to grant leave to
12 amend nevertheless remains within the discretion of the district court." Id.

13 At the October 18, 2023 hearing, Plaintiff's counsel conceded no remedy is available to
14 Plaintiff under his first cause of action for violation of California Civil Code section 2923.5
15 because the property has already been sold. Accordingly, because the claim cannot be cured by
16 amendment, the Court recommends granting Defendant's motion to dismiss Plaintiff's first cause
17 of action without leave to amend. Further, Plaintiff conceded in his opposition that he was no
18 longer pursuing his second cause of action for violation of California Civil Code section
19 2924(a)(1). Plaintiff's counsel also conceded at the hearing that Plaintiff did not oppose
20 Defendant's motion to dismiss his fourth cause of action for negligence. Given Plaintiff's
21 concessions, the Court also recommends granting Defendant's motion to dismiss Plaintiff's
22 second and fourth causes of action without leave to amend.

23 As to Plaintiff's fifth cause of action for wrongful foreclosure, sixth cause of action for
24 UCL violations, and seventh cause of action for cancellation of instruments, the Court finds
25 Plaintiff has not acted in bad faith and it would not prejudice Defendant or be futile to grant
26 another opportunity to cure deficiencies in the complaint. The Court therefore recommends that
27 Plaintiff be granted leave to amend his complaint to address the deficiencies in his fifth, sixth,
28 and seventh causes of action as noted in these findings and recommendations.

1 V.

2 **RECOMMENDATION AND ORDER**

3 For the above explained reasons, IT IS HEREBY RECOMMENDED that:

- 4 1. Defendant's request for judicial notice be GRANTED;
- 5 2. Defendant's motion to dismiss Plaintiff's first, second, and fourth causes of
- 6 action, be GRANTED without leave to amend;
- 7 3. Defendant's motion to dismiss Plaintiff's third cause of action be DENIED;
- 8 4. Defendant's motion to dismiss Plaintiff's fifth and seventh causes of action be
- 9 GRANTED with leave to amend; and
- 10 5. Defendant's motion to dismiss Plaintiff's sixth cause of action be granted in part
- 11 and denied in part as follows:
 - 12 a. Defendant's motion to dismiss Plaintiff's sixth cause of action for UCL
 - 13 violations predicated on California Civil Code sections 2923.5, 2924(a)(1),
 - 14 and 2934a(a)(1) be GRANTED without leave to amend; and
 - 15 b. Defendant's motion to dismiss Plaintiff's sixth cause of action for UCL
 - 16 violations predicated on California Civil Code section 2924.9 and 15 U.S.C. §
 - 17 1641(g) be GRANTED with leave to amend.

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1 These findings and recommendations are submitted to the district judge assigned to this
2 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within **fourteen**
3 **(14) days** of service of these recommendations, the parties may file written objections to the
4 findings and recommendations with the Court. Such a document should be captioned
5 "Objections to Magistrate Judge's Findings and Recommendations." The District Judge will
6 review the Magistrate Judge's findings and recommendations pursuant to 28 U.S.C. §
7 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may
8 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)
9 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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11 IT IS SO ORDERED.

12 Dated: November 21, 2023



UNITED STATES MAGISTRATE JUDGE

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